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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The respondents in the above-entitled matter submit that the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") should be denied. The respondents concur in the petitioners' statements under the headings *Opinions Below, Jurisdiction* and *Statutes Involved* in the Petition. The Appendices to the Petition (hereinafter "Pet. App.") are incorporated herein by reference.

Questions Presented

The respondents submit that petitioners' Questions 1, 2 and 3 (Pet. at 4-5) in fact constitute one question stated in three different ways. Moreover, petitioners' Question 4 (Pet. at 5), when considered in light of the arguments presented in support of it (Pet. at 23-25), is not stated clearly. Finally, respondents submit that petitioners' Question 4 attempts to raise an issue that is not properly before this Court because it was not raised in either the district court or the court of appeals. Accordingly, respondents state the questions presented as follows:

1. Must the protection of the boycott exception to the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1970), be narrowly limited to boycotts, coercion, or intimidation of insurance companies and agents, or does its protection extend to others, including policyholders?

2. Since petitioners did not challenge the sufficiency of the complaint to raise a claim of boycott, coercion, or intimidation in the courts below, are they not foreclosed from raising that issue in this Court at this time?

3. Does the complaint sufficiently allege acts of boycott, coercion or intimidation?

Statement of the Case

Both the Petition and the *Amici Curiae* Brief of the American Insurance Association, *et al.*, persistently misstate the respondents' allegations of an illegal boycott as "a collective refusal to sell them [respondents] coverage *on terms they desire.*" (Pet. at 25) (emphasis added). To be sure, the *purpose* of the alleged conspiracy was to deny medical malpractice coverage on an occurrence basis to physicians who were insured by petitioner St. Paul at the inception of the conspiracy. Amended Complaint,

Count I, ¶ 30 (Pet. App. at 47a). The alleged boycott itself, however, consisted of the concerted refusal of petitioners Aetna, Travelers and Hartford to sell *any* medical malpractice insurance on *any* terms to physicians then insured by St. Paul. *Id.* ¶ 32 (Pet. App. at 47a-48a). In addition, the complaint alleges that petitioners have engaged in a purposeful course of coercion and intimidation. *Id.* ¶¶ 35, 40 (Pet. App. at 48a-50a). Whether these allegations state a claim upon which relief can be granted depends upon the scope of section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1970), which provides:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation."

In resolving that issue, the First Circuit acknowledged the existence of several cases holding that, notwithstanding the apparent broad scope of the boycott exception, Congress intended that exception to apply only to insurance company boycotts of other insurance companies or agents. The court declined to follow those cases. It pointed out that the first of them, *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), "though referring broadly to 'the legislative history,' cited only a single page of the Congressional Record in support of this reading." *Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d 3, 7 (1st Cir. 1977) (Pet. App. at 6a), *petition for cert. filed*, 46 U.S.L.W. 3067 (U.S. Aug. 12, 1977) (No. 77-240). It then noted that subsequent cases have simply adopted *Transnational's* interpretation of the legislative history, without any independent analysis of the issue, on the ground that any other reading of the boycott exception would "vitiate" or "emasculate" the McCarran-Ferguson antitrust exemption. *Id.* (Pet. App. at 6a-7a).

The First Circuit based its rejection of prior authority on three grounds. First, the language of the statute is plain and unambiguous, and there is no need to resort to the legislative history to determine its scope. In support of this ground, the court stated that the words of the boycott exception,

> "within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a 'concerted refusal to deal' with a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Concerted refusal by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed, appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language." 555 F.2d at 7-8 (Pet. App. at 7a-8a). (footnote omitted).

Second, the First Circuit effectively refuted the unsupported assertions of some courts—repeated by petitioners and *amici* herein—to the effect that a narrow construction of the boycott provision is necessary to prevent "vitiation" or "emasculation" of the antitrust exemption. The court pointed out that, if the boycott exception were given its natural scope instead of an artificially narrow reading, McCarran-Ferguson would still (1) ensure the validity of state taxation and regulation of the business of insurance, and (2) insulate insurance companies both from antitrust liability for acts not amounting to boycott, coercion, or intimidation and from many other federal regulatory statutes. *Id.* at 8 (Pet. App. at 8a-9a). Nor, the court continued,

> "would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired 'boycott, coercion, or intimidation,' for the boycott provision merely guarantees that '[n]othing contained in *this chapter* shall render the said Sherman Act inapplicable' to boycotts and the like. 15 U.S.C. § 1013(b) [emphasis added].* The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving intact the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability. [Citation omitted.] Indeed, *Parker* v. *Brown* may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. *But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies.* Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id.* at 8-9 (Pet. App. at 9a-10a). (emphasis added).

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* Emphasis added by the court.

Finally, notwithstanding its belief that reference to the legislative history was unwarranted, the court entered into a detailed consideration of that history "in deference to the courts which have found support in [it]." *Id.* at 9 (Pet. App. at 12a). After an extensive discussion, including quotations of the congressional remarks relied upon most heavily by petitioners, the court concluded that the legislative debates and reports not only contain no evidence of a congressional intent to limit the boycott exception to acts or agreements directed against other insurance companies or agents, but actually support the view that the exception includes any boycott that is illegal under the Sherman Act:

> "[T]he boycott provision [was] the all purpose safety valve. It was amended twice, in each case to make it broader, first by making its effective across the entire Act and second by restoring the agreement language. Time after time the concern of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel. *See* Levi, *An Introduction to Legal Reasoning,* 15 U. Chi. L. Rev. 501, 522 (1948). * * * While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed, Senator O'Mahoney referred to the Insurance Executives Association rules as 'the sort of agreement' to be condemned. *His summary answer to Senator Barkley that 'every effective combination or agreement to carry out a program against the public interest' would be prohibited by the boycott section could not be more unrestricted."* *Id.* at 11-12 (Pet. App. at 18a-19a) (emphasis added).

Reasons for Refusing the Writ

I. The Opinion of the First Circuit Gave Full Consideration to the Issues Presented and Decided Them Correctly.

The First Circuit majority was, perhaps, being charitable when it referred to the prior cases with which it disagreed as a "formidable array of authorities." *Id.* at 7 (Pet. App. at 6a). In reality, those cases are formidable only by their bulk, not by their persuasiveness. They contain no reasoning to support their artificially narrow reading of the boycott exception; their discussions of the issue are uniformly brief, superficial and conclusory. The most cursory examination of these cases reveals their lack of persuasive force. *Accord,* Brief for Respondent in Opposition at 4-5, *Blue Shield* v. *Ballard,* 97 S. Ct. 1341 (1977), *denying cert. to* 543 F.2d 1075 (4th Cir. 1976).

Even the number of the authorities *contra* is not impressive when the cases are closely examined. Most of them are district court cases that simply follow circuit precedent. There are only two appellate decisions that are contrary to the decision of the First Circuit in the present case—and both of them adopt, without analysis, and rely entirely on a brief paragraph of dicta from a single district court opinion. Moreover, one of those appellate decisions, an opinion of the Fifth Circuit, is in direct conflict with a nearly contemporaneous decision by another panel of the same circuit.

The First Circuit is not only the first court to present reasoned grounds for its decision on this issue; it is also the first court to quote the relevant legislative history and to explain the basis for the conclusion it draws therefrom, instead of making undocumented and unsupported assertions about "the" legislative history. A comparison of the

First Circuit's opinion with those of the authorities *contra* clearly reveals the correctness of the former. Moreover, there is other case authority—some of it either misstated or ignored in the Petition—that strongly supports the decision of the First Circuit.

A. *The opinions in* Transnational *and its progeny are so brief and conclusory as to have little, if any, precedential value.*

The line of cases relied upon by petitioners begins with *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966). Since the *Transnational* court expressly found that, on the record before it, there had been no boycott, *id.* at 26-29, its comments concerning the scope of the boycott exception are only dicta. Moreover, those dicta are confined to a single brief paragraph, which cites—but does not quote—only one remark from the extensive congressional debates as the basis for its conclusion that Congress intended the apparently broad boycott exception to have an extremely narrow application. *Id.* at 26-27 & n.1.

Despite the casual nature of these gratuitous comments, two courts of appeals and several district courts have taken them as gospel. *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), simply follows *Transnational* and the district court decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975), which had also followed *Transnational*. The *Addrisi* court quoted *Transnational*'s brief discussion of the issue almost in full; it made no independent examination of the legislative history. It then asserted, without discussion, that any other holding would "vitiate" the McCarran-Ferguson Act. 503 F.2d at 729.

The opinion of a panel of the Fifth Circuit in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), is even briefer than the *Addrisi* opinion. The court cited only *Transnational* and the decision of the court below in support of its holding. Like the Ninth Circuit, the *Meicler* court neither entered into an independent consideration of the legislative history nor provided any reasoned analysis of the grounds for its decision. *Id.* at 734-35.

Furthermore, *Meicler* was really a price-fixing case, notwithstanding the efforts of the plaintiffs therein to frame their complaint in terms of a boycott. "[T]he alleged boycott [in *Meicler*] consisted of nothing more than adherence by a group of insurance companies to premium rates set by a state regulatory agency, or perhaps by private agreement." *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cas. ¶ 61,481, at 71,869 n.21. (D.C. Cir. June 17, 1977). Thus, the court's perfunctory rejection of the plaintiffs' arguments concerning the scope of the boycott exception may well have resulted from the patent failure of the complaint to allege a boycott. In any event, petitioners' statement that the allegations in *Meicler* are "a precise analogue to those presented here" (Pet. at 14) is incorrect; for the complaint in this case alleges the concerted refusal of three of the defendant insurance companies to sell *any* medical malpractice insurance on *any* terms to the policyholders of the fourth.

Finally, *Meicler* conflicts with a decision handed down only a few months earlier by another panel of the Fifth Circuit in *Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). *See* section I B of this Brief, *infra*. The respondents, therefore, do not agree with petitioners that *Meicler* represents the current position of the Fifth Circuit on this issue; rather, we submit that *Meicler* has created an intra-circuit conflict in the Fifth Circuit insofar as it is

inconsistent with *Battle*. Thus, only one circuit—the Ninth —has clearly taken a position contrary to the decision of the First Circuit in the present case.

The other cases relied upon by petitioners — all of them district court decisions — add nothing to the analysis. They merely reassert the alleged intent of Congress that the boycott exception be limited to a narrow class of boycotts, cite each other as compelling authority, and ultimately rely on *Meicler, Addrisi* and/or *Transnational*.[1] Not one of them undertakes either an independent consideration of the reasons for its decision or an independent examination of the legislative history. Their number does not increase their precedential value.

In sharp contrast to *Transnational* and its progeny, the opinion of the First Circuit in the present case gives a detailed, well-reasoned discussion of the basis for its holding. 555 F.2d at 7-9 (Pet. App. at 7a-12a). Salient portions of that discussion are quoted in respondents' *Statement of the Case, supra*. The First Circuit's opinion is manifestly superior to the conclusory discussions in *Transnational, Meicler* and *Addrisi*.

The First Circuit opinion also includes a detailed examination of the legislative history, *id.* at 9-12 (Pet. App. at

[1] *Pierucci* v. *Continental Cas. Co.*, 418 F. Supp. 704, 708-09 (W.D. Pa. 1976); *McIlhenny* v. *American Title Ins. Co.*, 418 F. Supp. 364, 371-72 (E.D. Pa. 1976) (really a tying case, not a boycott case); *Royal Drug Co.* v. *Group Life & Health Ins. Co.*, 415 F. Supp. 343, 349-50 (W.D. Tex. 1976), *appeal docketed*, No. 72-2746 (5th Cir. June 24, 1976); *Seasongood* v. *K & K Ins. Agency*, 414 F. Supp. 698, 702 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mathis* v. *Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037, 1041 (W.D. Mo. 1976); *Ohio* v. *Ohio Medical Indem., Inc.*, 1976-2 Trade Cas. ¶61,128, 68-397-98 at 70,113 (S.D. Ohio 1976); *Pastor* v. *Hartford Fire Ins. Co.*, 1976-1 Trade Cas. ¶60,783, at 68,397-98 (C.D. Cal. 1976), *appeal docketed*, No. 77-1243 (9th Cir. Jan. 26, 1977); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27, 32 (D.D.C. 1975), *aff'd on other grounds*, 1977-1 Trade Cas. ¶61,481 (D.C. Cir. June 17, 1977); *Mitgang* v. *Western Title Ins. Co.*, 1974-2 Trade Cas. ¶75,322, at 98,026 (N.D. Cal. 1974).

12a-18a), which demonstrates that the interpretation of that history adopted in *Transnational* and its progeny is unsupportable. The *Transnational* interpretation holds that, since insurance company blacklists are the only specific evil mentioned in the legislative debates, they must be the only evil that the boycott exception was intended to remedy. We submit that the conclusion does not follow from the premise. Even petitioners admit that "boycotts and blacklists of other insurance companies and agents • • • were Congress' *main* concern at the time it enacted the exception • • • ." (Pet. at 3) (emphasis added). This statement necessarily concedes that Congress had some other concerns as well when it enacted the boycott exception; and neither petitioners nor the cases upon which they rely suggest any reason to believe that Congress' concern did not extend to all potential victims of insurance company boycotts, coercion, or intimidation — including policyholders.

Selected quotations from the congressional debates on the boycott exception are annexed hereto as Appendix A. It is readily apparent that these debates, which contain many emphatic statements of the broad scope of the boycott exception, give substantial support to the First Circuit's decision. In addition, a letter from former Representative Emanual Celler, published in the Congressional Record in response to the *Addrisi* decision, is annexed hereto as Appendix B. Mr. Celler was the author of the remarks cited by the *Transnational* court in support of its view of the scope of the boycott exception. Those remarks are also included in Appendix B, and, as Mr. Celler's letter makes clear, they provide no support for the decisions in *Transnational* and its progeny.

B. *Other case authority strongly supports the decision of the First Circuit.*

The petitioners attempt to portray the decision of the First Circuit in this case as a legal aberration — unprece-

dented and unprincipled. This portrayal is inaccurate. Although it is the first decision of its kind *on these facts,* the First Circuit's decision is well supported by both prior and subsequent cases.

To begin with, the Second Circuit has squarely held that "*all* boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law" by the boycott exception. *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.,* 326 F.2d 841, 846 (2d Cir. 1963), *cert. denied,* 376 U.S. 952 (1964) (opinion of Kaufman, J.) (emphasis added); *accord, Professional Adjusting Systems of America, Inc.* v. *General Adjustment Bureau, Inc.,* 64 F.R.D. 35, 42-43 (S.D.N.Y. 1974); *Travelers Insurance Co.* v. *Blue Cross,* 306 F. Supp. 219, 221 (W.D. Pa. 1969); *Cooperativa de Seguros Multiples* v. *San Juan,* 294 F. Supp. 627, 628 (D.P.R. 1968); *see Professional & Business Men's Life Insurance Co.* v. *Bankers Life Co.,* 163 F. Supp. 274, 282-83 (D. Mont. 1958).

Furthermore, both the Fourth Circuit and a panel of the Fifth Circuit, have, like the First Circuit, refused to limit the boycott exception to boycotts against other insurance companies and agents. The Fifth Circuit case is *Battle* v. *Liberty National Life Insurance Co.,* previously referred to in section IA, *supra.* The complaint in that case alleged acts of boycott, coercion and intimidation by the defendant, a provider of funeral insurance, against funeral homes that refused to submit to its monopolistic practices. The court first discussed at some length the possibility that the defendant's alleged activities did not constitute "the business of insurance" and therefore did not qualify for the antitrust exemption contained in section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b) (1970). The court was of the opinion, however, that "the facts in the case at hand are inadequately developed to make a conclusive determination of this question * * *." 493 F.2d at 50. Accordingly, the court continued as follows:

> "Even assuming that defendants are engaged in the business of insurance and that it is regulated by state law, ***this exemption is eviscerated by any boycott, coercion or intimidation on behalf of the defendants.*** The complaint specifically alleges that the defendants have engaged in such activities. Among other averments, plaintiffs set out in the complaint that, if an authorized funeral director in a particular area decides to cancel his contract with Brown-Service, the defendants have threatened to build a competing funeral home in the same locality. Liberty National, it is asserted in the complaint, has threatened to cancel contracts of those who oppose its activities. Moreover, the plaintiffs allege acts of physical violence in Liberty national's asserted attempt to monopolize the industry. Without a hearing to establish the validity of such contentions, the district court could not accurately determine the applicability of this limitation of the McCarran Act." *Id.* at 51 (emphasis added) (footnote omitted).

Although petitioners have understandably chosen not to mention *Battle* in the Petition, they have argued in the courts below that *Meicler* implicitly overruled it. We cannot agree. The overruling of circuit precedent is a function that can be performed only by all the active judges of a court of appeals sitting en banc, not by a panel. Moreover, the *Battle* panel included Judge John Wisdom, one of the most distinguished circuit judges in the nation. It would seem that *Battle* is entitled to at least as much precedential weight within the Fifth Circuit as *Meicler,* which was not even a boycott case. (*See* section IA, *supra*). The respondents submit, therefore, that the Fifth Circuit cannot yet be claimed by either side in the present case.

In the Fourth Circuit case mentioned above, *Ballard* v. *Blue Shield,* 543 F.2d 1075 (4th Cir. 1976), *cert. denied,* 97

S. Ct. 1341 (1977), the court held that a conspiracy of physicians and health insurers to refuse health insurance coverage for services rendered by chiropractors constituted a boycott and fell within the boycott exception. *Id.* at 1078. Like the First Circuit's decision in the present case, *Ballard* constitutes a refusal to limit the protection of the boycott exception to insurance companies and agents.

Finally, the First Circuit's position is strongly supported by the recent decision of the District of Columbia Circuit in *Proctor* v. *State Farm Mutual Automobile Insurance* Co., 1977-1 Trade Cas. ¶61,481 (D.C. Cir. June 17, 1977). The petitioners have stated the facts of *Proctor* correctly. (Pet. at 16). They are mistaken however, in their assertion that it represents "yet another narrower construction of the boycott exception" (Pet. at 16) and that it is "flatly inconsistent with the result reached by the First Circuit" (Pet. at 17). To begin with, the *Proctor* court recognized that

> "there is no hint in the plain language of the provision that only acts and agreements directed against insurance companies or agents were to be subject to the exception. And our examination of the legislative history of the provision, and the target at which it was aimed, convinces us that no such limitation was intended." *Id.* at 71,867.

The court then proceeded to examine the legislative history in some depth, *id.* at 71,867-69, thus becoming the only court other than the First Circuit to do so. It concluded that the legislative history shows that "blacklists were *a* concern of the Congress—perhaps even the principal concern—but does not show that they were the *only* concern." *Id.* at 71,868 (emphasis in the original). After noting that the "boycott, coercion or intimidation" language was drawn from *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 535 (1944), the court concluded that the boycott exception "was intended to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of 'boycott, coercion, or intimidation' to the prohibitions of the Sherman Act." 1977-1 Trade Cas. at 71,869.

Thus, the only court other than the First Circuit to consider this issue in depth has reached the same conclusion as did the First Circuit. The short answer to petitioners' assertion that *Proctor* does not allow policyholder suits (Pet. at 17) is that *Proctor* was not a policyholder suit, and the court therefore had no occasion to discuss the matter. The fact remains that *Proctor* emphatically rejected the artificial *Transnational* limitation of the boycott exception, calling it "unsupported by [the exception's] plain language, its legislative history, or the historical context in which it was passed." 1977-1 Trade Cas. at 71,869. It can hardly be doubted that the District of Columbia Circuit would, in an appropriate case, join the First Circuit in holding that the boycott exception includes boycotts against policyholders. Thus, it is *Meicler* and *Addrisi* that are aberrations, not *Barry*.

C. *The dire consequences predicted by petitioners and* amici *will not occur.*

The *amici* argue that the present suit seeks to "call into question state-regulated insurance practices" and that, if it is permitted to proceed, the federal courts "will be placed in the position of passing upon the efficacy and propriety of the minutiae of state insurance regulation." (*Amici Curiae* Brief of the American Insurance Association, *et al.*, at 8). This argument is not well taken, however, for the alleged boycott in this case was neither mandated nor approved nor even permitted by any state regulatory agency; it took place entirely outside the structure of state regulation. *See Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d at 9 (Pet. App. at 10a). Consequently,

neither the "efficacy" nor the "propriety" of state insurance regulation is at issue in this case. If the matter is permitted to proceed in the district court, the antitrust claim will be litigated without any reference to state regulatory practices, and state regulation of insurance rates and coverages will not be disturbed.[2]

The petitioners' argument that the First Circuit's decision limits the McCarran-Ferguson antitrust exemption to the acts of individual monopolists (Pet. at 21) is also mistaken. There are many conspiracies condemned by the antitrust laws, such as price fixing, price discrimination and tying arrangements, that cannot be described as boycotts.[3] In arguing that the First Circuit's decision means wide-open antitrust liability for insurance companies, petitioners and *amici* have confused the scope of the boycott exception with the definition of the term "boycott." It is neither necessary nor appropriate to give the boycott exception an artificially narrow reading in order to avert the imaginary horribles conjured up by petitioners (Pet. at 21) and *amici* (*Amici Curiae* Brief of the American Insurance Association, *et al.*, at 8-9);[4] all that is needed is a reasonable definition of what conduct constitutes a boycott — a matter to be taken up in section IIIB of this Brief, *infra*. *See Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cas. at 71,869.

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[2] Moreover, petitioners' statement that the commencement of this suit "virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ('JUA')" (Pet. at 8), though literally true, is quite misleading; for the amended complaint alleges that petitioners' fraudulent acts and misrepresentations created the purported "malpractice insurance crisis" that led to the formation of the JUA. Amended Complaint, Count III, ¶¶16-18 (Pet. App. at 58a-59a). This count has been dismissed and is not at issue before this Court.

[3] In fact, one of the arguments against the boycott exception in the Senate debates was that it left *too much* room for insurance companies to engage in activities that would otherwise be antitrust violations. *See* Appendix C, *infra*.

[4] The practices described by *amici* are typically state-approved or state-mandated and therefore exempt from the antitrust laws. *See Barry* v. *St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 8-9 (Pet. App. at 9a-10a). That is not the case with the conduct alleged here.

D. *The decision below does not conflict with* SEC v. National Securities, Inc.

Finally, it should be noted that petitioners' reliance on *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), is misplaced. In that case, the Court had to decide whether a state statute designed to protect the owners of insurance company stock was a law regulating "the business of insurance" and therefore, by virtue of McCarran-Ferguson, preemptive of the Securities Exchange Act. Thus, the Court's discussion of McCarran-Ferguson concerned only the definition of "the business of insurance" under section 2(b) of that Act, 15 U.S.C. §1012(b) (1970); the Court did not consider the extent to which that business remained subject to the antitrust laws by virtue of the boycott exception set forth in section 3(b), *id.* §1013(b). There is, therefore, no conflict between the First Circuit's decision in the present case and the *National Securities* decision.

II. The Issue Is Not Ripe For Review by This Court.

The respondents recognize, of course, that there is a conflict between the First, Second and District of Columbia Circuits on the one hand and the Ninth Circuit on the other, plus an intracircuit conflict within the Fifth Circuit, concerning the scope of the boycott exception.[5] However, this

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[5] The petitioners' suggestion that the Third Circuit agrees with the Ninth Circuit on this issue (Pet. at 15) is mistaken. The district court in *Frankford Hospital* v. *Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976), followed *Meicler* only insofar as that case held that the boycott exception was intended *primarily* to deal with insurance company blacklists. The court then said, *id.* at 1110 n.14:

> "We apply emphasis to the word 'primarily' because we do not believe section 1013(b) should be strictly limited to * * * insurance company blacklisting. In appropriate circumstances, the language of that provision would reach other practices which have the same purpose and effect as black-

Court no longer grants certiorari as a matter of course simply because there is a split in the circuits. *See* Stern, *Denial of Certiorari Despite a Conflict,* 66 Harv. L. Rev. 465 (1953). We submit that certiorari should be denied in this case, notwithstanding the split in the circuits, because the issue is not ripe for review.

A. *The conflict may resolve itself.*

As pointed out in section I of this Brief, *supra,* the First Circuit's opinion in the present case is the first opinion on this issue to undertake a detailed discussion of the matter, including a thorough examination of the legislative history, and to give reasoned grounds for its decision. The subsequent *Proctor* opinion is equally thoughtful, detailed and well-reasoned—and, it should be noted, reaches the same conclusion as did the First Circuit without having had the benefit of the First Circuit's opinion. By comparison, the *Meicler* and *Addrisi* opinions are superficial and conclusory. Moreover, *Battle* is at least as persuasive a precedent within the Fifth Circuit as *Meicler.*

Cases that present this same issue are now pending in the Fifth and Ninth Circuits. *Royal Drug Co.* v. *Group Life & Health Insurance Co.,* 415 F. Supp. 343 (W.D. Tex. 1976), *appeal docketed,* No. 76-2746 (5th Cir. June 24, 1976);

listing or which are equally pernicious in violating the most fundamental notions of competition and fair play. In the instant case we are not presented with circumstances that require us to decide that issue."

The court went on to find that, assuming that the boycott exception did apply, there was no boycott in the case before it. The Third Circuit affirmed on the ground that there was no boycott. *Frankford Hosp.* v. *Blue Cross,* 554 F.2d 1253 (3d Cir. 1977) (per curiam), *petition for cert. filed,* 46 U.S.L.W. 3040 (U.S. July 29, 1977 (No. 77-171). Thus, the Third Circuit has not passed on the scope of the boycott exception and is not involved in the conflict among the circuits on this issue. If anything, its implicit approval of the district court's dicta in *Frankford* supports the position of the First Circuit.

Pastor v. *Hartford Fire Insurance Co.,* 1976-1 Trade Cas. ¶ 60,783 (C.D. Cal. 1976), *appeal docketed,* No. 77-1243 (9th Cir. Jan. 26, 1977). Those courts will now have the benefit of the *Barry* and *Proctor* opinions. It is submitted that they may well find those opinions more persuasive than *Meicler* and *Addrisi.* If they do, *Meicler* and *Addrisi* will be overruled within the coming year, thus eliminating both the split in the circuits and the intracircuit conflict in the Fifth Circuit. Review by this Court at this time would therefore be premature.

B. *Even if the conflict does not resolve itself, this Court would benefit from further consideration of the issue by the courts of appeals.*

It is possible, of course, that the Ninth Circuit will adhere to its prior decision in *Addrisi* and that the Fifth Circuit will choose to follow *Meicler* rather than *Battle.* If so, however, those courts will have to rebut in some detail the arguments set forth in *Barry* and *Proctor.* They will have to give reasoned grounds for their decisions. They will have to specify the legislative history upon which they rely, as they did not do in *Meicler* and *Addrisi.* Such thorough, well-reasoned opinions would be a far more satisfactory basis for review than are the many superficial opinions presently available.

This Court would benefit by having the best possible opinions from courts on both sides of the issue—not just one side—when and if it takes the matter up for review. The *Barry* and *Proctor* opinions will surely have a profound effect on the development of the law on this point in the circuits. The respondents submit that this development should be permitted to continue until all of the relevant issues have been fully aired in the courts of appeals.

III. The Issue Raised by Petitioners Concerning the Sufficiency of the Complaint's Allegations of a Boycott Should Not Be Taken Up For Review in Any Event.

The petitioners' Question 4 (Pet. at 5) amounts to a contention that their alleged concerted refusal to deal with certain policyholders does not constitute a boycott within the common meaning of that term. (*See* Pet. at 23-25). The respondents submit that this issue is not properly before the Court and that, even if it is, petitioners' argument is without merit and the issue is not an appropriate subject for review by this Court.

A. *The issue is not properly before the Court.*

The petitioners moved to dismiss Count I of the Amended Complaint on the ground that McCarran-Ferguson "exempts from the operation of the Clayton Act and the Sherman Act state regulated insurance business." (Appendix D, *infra*). That was also the basis of the district court's decision to grant the motion. (Pet. App. at 30a-31a). The petitioners did not claim any other insufficiency of the complaint in the district court. Nor did they argue in the court of appeals that the conduct alleged in the complaint does not constitute a boycott within the common meaning of that term. 555 F.2d at 7-8 (Pet. App. at 8a). They are therefore precluded from raising that issue on certiorari in this Court. The Court has refused in numerous cases brought before it on writs of certiorari to pass on issues not properly raised in the courts below. *See FTC* v. *Travelers Health Association*, 362 U.S. 293, 298-99 n.4 (1960); *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 61-62 n.4 (1959); *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937); *Lynch* v. *United States*, 292 U.S. 571, 587-88 (1934); *New York Dock Co.* v. *Steamship Poznan*, 274 U.S. 117, 123 (1927); *cf. Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

B. *The complaint sufficiently alleges boycott, coercion and intimidation.*

The First Circuit found a footnote and a brief textual discussion sufficient to deal with this issue. 555 F.2d at 7-8 & n.4. As it pointed out, the Ninth Circuit has squarely held that the concerted refusal of manufacturers or dealers to do business with customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Association* v. *Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). Even *Transnational Insurance Co.* v. *Rosenlund, supra*, upon which petitioners rely so heavily, states that "the generally accepted meaning of boycott" is "a concerted refrainment from business relations with another," 261 F. Supp. at 28, without any limitations on who that "other" might be.

Any doubt as to the correctness of the holding in *Washington State Bowling, supra*, is dispelled by consideration of two decisions of this Court. In *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)—the case from which Congress drew the "boycott, coercion or intimidation" language of McCarran-Ferguson—the Court described the charges set forth in the indictment as follows:

> "The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. * * * [*P*]*ersons needing insurance who purchased from non-*

> *S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.*" *Id.* at 535-36 (emphasis added).

Moreover, the concluding paragraph of the opinion referred to "combinations of insurance companies to coerce, intimidate, and boycott competitors *and consumers.*" *Id.* at 562 (emphasis added). Thus, the *South-Eastern Underwriters* Court was clearly of the opinion that consumers in general, and consumers of insurance in particular, could be the subject of a boycott. And, as the District of Columbia Circuit said in *Proctor,* "[w]e find it hard to believe that Congress would have intended a construction of the boycott provision which excludes from its sweep activities explicitly addressed in the case from which its language is drawn." 1977-1 Trade Cas. at ¶ 71,869.

The issue was addressed again in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam). The complaint in that case alleged that the defendants had conspired against the plaintiff by refusing to give its gas burner a seal of approval and by refusing to sell gas to consumers for use in any burner that did not have a seal of approval. The Court held that the alleged concerted refusal of the defendant gas companies to deal with *consumers* would, if proved, constitute a *per se* violation of the Sherman Act. *Id.* at 659-60. Although the Court did not use the word "boycott," it clearly indicated, *id.,* that its decision was based upon *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959)—a leading boycott case.

Thus, petitioners' argument that the concerted refusal of insurers to deal with policyholders does not constitute a boycott is without merit. There is no split among the circuits on this issue, nor is it a matter of such doubt and importance as otherwise to call for review by this Court.

Finally, the complaint expressly alleges coercion and intimidation by petitioners. Amended Complaint, Count I, ¶¶ 35, 40 (Pet. App. at 48a-50a). The petitioners have never challenged the sufficiency of these allegations. Thus, even if the conduct alleged in the complaint does not constitute a boycott, respondents are still entitled to proceed under the coercion or intimidation exception. Consequently, petitioners' arguments concerning the definition of the term "boycott" are not of a dispositive nature and should not be taken up for review in any event.

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied. If, however, the Court should determine to grant certiorari, the grant should be limited to Question 1 as stated in this Brief, *supra* p. 2.

Respectfully submitted,

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October, 1977

APPENDIX A

Selections from the Legislative Debates on the Boycott Exception

1. 91 Cong. Rec. 478 (1945) (remarks of Senator Ferguson) (emphasis added):

> No, I will answer that by saying that *if agreements in restraint of trade or to monopolize amounted either to a boycott or to coercion and/or intimidation, they would be absolutely void,* because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today.

2. *Id.* at 1090 (remarks of Representative Gwynne) (emphasis added):

> The important part of the bill is that section which provides for a moratorium as far as the application of the Sherman and Clayton Acts are concerned. *Part of the Sherman Act is in effect right now; in fact, that part having to do with boycotts, coercion, and intimidation.* The rest of the Sherman Act and the Clayton Act will not take effect until July 1, 1948.

3. *Id.* at 1443 (remarks of Senator Ferguson) (emphasis added):

> *There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation.*

4. *Id.* at 1481 (remarks of Senator Ferguson) (emphasis added):

> Under the language which is now in the bill as it appears in the conference report, if a State passes

> an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions: "Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."
>
> *In other words, under the terms of the bill, there are six things on which a State would not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.*

5. *Id.* at 1486 (colloquy between Senator Barkley and Senator O'Mahoney (emphasis added):

> MR. BARKLEY. Let me ask this question: Suppose the regulatory laws of a State permit combinations which might be regarded as violative of the Sherman or Clayton Acts, and over which Congress itself might wish to exercise jurisdiction, are such combinations so sanctioned by the laws of the States to be allowed, even if Congress itself should decide to exercise jurisdiction?
>
> MR. O'MAHONEY. No; my judgment is that *every effective combination or agreement to carry out a program against the public interest* of which I have had any knowledge in this whole insurance study *would be prohibited by the very section [3(b)] the Senator from Kentucky had quoted.*

6. *Id.* (remarks of Senator O'Mahoney):

> [T]he great gain which has been achieved by the complete agreement of the Senate and House conferees, to the effect that agreements as well as acts of boycott, coercion, and intimidation should be outlawed, is so distinctly in the public interest that we should not risk its loss.

APPENDIX B

Remarks of Representative Celler Concerning the Boycott Exception

1. Cong. Rec. 1087 (1945) (remarks of Representative Celler):

> What is the danger in leaving the word [agreement] out? There is a great deal of danger. These great companies can issue a blacklist. It need not be in writing, there need not be a so-called overt act, it could be an oral blacklist, and they would frighten the wits out of all these small companies. In addition there could be an "agreement" for what is known as separation. Let me tell you something about the "separation." Under "separation," if the agent wrote insurance for an outside or marked or proscribed company, or a blacklisted company, he was immediately stripped of his privileges; that is to say, he was not permitted to write insurance for any of the members of the self-constituted governing organizations known as boards. If a member of any of the boards wrote business through that agent which represented independent or nonmember companies, such member company was subject to punishment and was compelled to give up the business.
>
> That's why I want the word "agreement" put back in the bill.

2. 120 Cong. Rec. 37351 (1974) (remarks of Representative Corman) (footnote omitted):

> Mr. CORMAN. Mr. Speaker, a letter and memorandum on the legislative history of section 3(b) of the McCarren-Ferguson Act, 59 Stat. 34 (1945), 15 U.S.C. 1013(b) were brought to my attention. Today, I would like to share them with my colleagues. Their author is the then chairman of the House Judiciary Committee and one of the great legislators of all times, the Honorable Emanuel Cellar [sic].
>
> The articles follow:
>
> WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,
> *New York, N.Y., November 15, 1974.*
>
> GEORGE D. DONNAHOE, Esq.,
> *Hollywood, Calif.*
>
> DEAR MR. DONNAHOE: This has reference to your letter of October 22, 1974 regarding the opinion of the Ninth Circuit Court of Appeals in *Addrisi* v. *The Equitable Life Assurance Society of the United States*, No. 72-2607 (slip op., Sep. 30, 1974). That opinion—relying on *Meicler* v. *Aetna Casualty and Surety Company*, 372 F. Supp. 509 (S.D. Texas, 1974), and *Transnational Insurance* v. *Rosenlund*, 261 F. Supp. 12 (D. Oreg. 1966)—states that it is evident from an examination of the legislative history behind [15 U.S.C.] § 1013(b) [of the McCarren-Ferguson Act] *"that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade among those in the business of insurance, namely anti-trust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents."* [Emphasis added.] Slip op. at 6-7.
>
> "The legislative history [behind the McCarran-Ferguson Act] shows that the boycott, coercion . . . exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a black-list, which would name companies or agents which were beyond the *pale*. This list, in effect,

was a directive to an agent not to write insurance in the name of or for the blacklisted company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies. 1. 91 Congressional Record, p. 1087 (79th Congress, 1st Session)."

The Congressional Record reference thus cited has to do with remarks I made on the House floor in which I endeavored—successfully—to amend the House version of the McCarran-Ferguson bill to make the Sherman Act applicable not only to any act of boycott, coercion, or intimidation (as provided in the House bill), but also to any agreement to boycott, coerce, or intimidate. My entire purpose in urging this amendment was thus to *broaden* and not to restrict the applicability of the Sherman Act. By no stretch of the imagination can my remarks be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents. To the contrary, I think it crystal clear, both from my own remarks and from the legislative history of the McCarran-Ferguson Act, that § 1013(b) was intended to render the Sherman Act applicable to (i) *all* agreements to boycott, coerce or intimidate and (ii) to *all* acts of boycott, coercion or intimidation. Indeed, an examination of the entire legislative history of the McCarran-Ferguson Act shows that at no point was there even the most remote suggestion that § 1013(b) was to be limited to the antitrust acts specified by the court in *Addrisi*.

In view of the importance of this matter and since I believe the holding in *Addrisi* carves out an exemption from the Sherman Act not intended by the Con-

gress, I have prepared the accompanying memorandum which sets forth in detail the entire legislative history of § 1013(b). This legislative history shows beyond peradventure of doubt that Congress intended in enacting § 1013(b) that the Sherman Act encompass *all* antitrust acts of boycott, coercion or intimidation by insurance companies, whether directed against policy holders, insurance agents or others—and not merely antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents.

Sincerely yours,

EMANUEL CELLER

[The legislative history presented by Mr. Celler is substantially the same as that set forth in the opinion of the First Circuit. *Compare* 555 F.2d at 9-11 (Pet. App. at 12a-16a) *with* 120 Cong. Rec. at 37352-53.]

APPENDIX C

Selection from the Legislative Debates on the Boycott Exception

91 Cong. Rec. 1487 (1945) (colloquy between Senator Pepper and Senator O'Mahoney):

MR. PEPPER. * * * There are other offenses which may be committed under the Sherman Act and under the Clayton Act, in addition to boycott, coercion, and intimidation, are there not?

MR. O'MAHONEY. Yes.

MR. PEPPER. So all the conference report does is to limit the [state] legislatures, in authorizing violation of the Sherman Act and the Clayton Act, only with respect to boycott, coercion, or intimidation. However, all other offenses which are condemned by the Clayton Act or the Sherman Act may, under the proposed legislation, be authorized pursuant to State laws.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 75-0176

DAVID M. BARRY, et al.,
PLAINTIFFS,

– against –

ST. PAUL FIRE & MARINE INSURANCE COMPANY, et al.,
DEFENDANTS.

MOTION OF THE AETNA CASUALTY & SURETY COMPANY TO DISMISS COUNTS I, II AND III OF THE AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT AS TO COUNT IV OF THE AMENDED COMPLAINT

The Aetna Casualty & Surety Company moves that Counts I, II and III of the Amended Complaint be dismissed on the following grounds:

1. Count I fails to state a claim upon which relief may be granted in that the McCarran-Ferguson Act, at 15 U.S.C.A. §1012(b), exempts from the operation of the Clayton Act and the Sherman Act state regulated insurance business.

[Remainder of motion omitted.]

THE AETNA CASUALTY & SURETY COMPANY
by its Attorneys,
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(s) STEPHEN J. CARLOTTI
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